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No. 85-2127

In The
Supreme Court of the United States
October Term, 1985

LIEUTENANT COLONEL BILLY McDANIEL,
Support Personnel Management Officer,
New Jersey Air National Guard,

Petitioner,

vs.

ROY JOHNSON and JOHN J. SHELLER,

Respondents.

BRIEF OF AMICUS CURIAE ADJUTANTS GENERAL ASSOCIATION OF THE UNITED STATES

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INTEREST OF THE AMICUS CURIAE

This case presents an issue of general importance for the National Guard throughout the United States, and in particular for the Adjutants General of the National Guard in the various states as the commanding officers. The amicus curiae, the Adjutants General Association of the United States (hereafter AGAUS) is the organization made up of all of the various state Adjutants General, each and every one of whom will be vitally affected by the outcome of this case. What has been advanced is a cause of action for damages against the Adjutant General of New Jersey along with other ranking officers of the New Jersey Air National Guard, relating to the termination of employment of two federal National Guard Technicians. As a separate part of this case, in a ruling by the Third Circuit which is not at issue before this Court on the petition for certiorari, the propriety of that dismissal was adjudicated. This portion of the litigation now presented to the Supreme Court deals only with the additional remedy of damages for alleged violation of federally protected rights pursuant to 42 *U.S.C.* § 1983. It is the right of National Guard Technicians, who by law are all part of National Guard military units, to sue their superior officers for money damages that is of grave concern to all Adjutants General in the performance of their military duties.

Aside from the clearly legitimate interest in the outcome of this matter, the overriding reason why leave should be granted for the AGAUS to appear as amicus curiae is that the prime policy argument against allowing this cause of action, while raised at the District Court level,[1] was not

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[1]See the decision of District Judge Anne Thompson filed on December 22, 1983, and appended to this brief.

part of the interlocutory question certified to the Third Circuit which court, accordingly, did not reach it. Yet it is this issue, whether the military nature of an Adjutant General's decision to terminate National Guard Technician employment should bar a civil rights action for damages, that would certainly be dispositve of this case and ought to be considered by this Court now. As the petition for certiorari has not included this as a question presented, although addressing it in Point II, this Court is respectfully urged to allow the AGAUS to appear as amicus in order to advance the argument, a substantial one which has met favor in various circuit courts of appeal as will be cited *infra* in the argument portion of this submission.

The AGAUS recognizes that this Court has at times in the past expressed that it will not consider arguments raised only by an amicus and not by the petitioner. *United Parcel Service Inc. v. Mitchell,* 451 *U.S.* 56, 60 n.2, 101 *S. Ct.* 1559, 67 *L.Ed.*2d 732 (1981). However, the Court has also stated that it is not barred from considering issues which are not part of the petition for certiorari. *Carlson v. Greene,* 446 *U.S.* 14, 100 *S. Ct.* 1468, 64 *L.Ed.*2d 15 (1980). Here, the argument advanced by AGAUS was made to the District Judge. For reasons not known to AGAUS, that issue was not certified to the Third Circuit although raised by AGAUS as amicus there. The Third Circuit declined to address it as noted in its opinion. *Johnson v. Orr,* 780 *F.*2d 386, 389, n.6 (3d Cir. 1986). Because this is an issue involving the United States military and the ability of key officers, the Adjutants General of the National Guard throughout the country, to perform their duties, this is certainly a case in which the Court ought to exercise its ability to consider an issue going beyond the petition for certiorari.

The AGAUS fully supports the arguments put forth in the petition for certiorari and certainly should be considered to join in those arguments. Because the points raised by petitioner have been more than adequately addressed, AGAUS will not seek to present any substantial further discussion. Those arguments are completely meritorious as recognized by Judge Rosenn in his dissent in the Third Circuit.

Both counsel for the petitioner and for respondents have consented to AGAUS filing an amicus brief, and written consent is submitted herewith.

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SUMMARY OF ARGUMENT

This Court in decisions beginning with *Feres v. United States,* 340 *U.S.* 135, 71 *S. Ct.* 153, 95 *L.Ed.* 152 (1950) and running through *Chappell v. Wallace,* 462 *U.S.* 296, 103 *S. Ct.* 2362, 76 *L.Ed.*2d 586 (1983), has, as a matter of policy, barred actions for damages by military personnel against their superior officers. The cause of action asserted here for damages under 42 *U.S.C.* § 1983 against the Adjutant General of New Jersey and other ranking officers by National Guard Technicians, who by law are also required to be active members of military units, runs afoul of the *Feres* doctrine as applied in *Chappell* and so must be prohibited.

For the reasons expressed by Judge Rosenn in his Third Circuit dissent in this case, appearing at 780 *F.*2d 395, et seq., the action of the Adjutant General in dismissing the two plaintiffs from their technician employment was not done "under color of state law" as required by Section

1983, and the National Guard Technician Act of 1968, 32 *U.S.C.* § 709, provides a complete statutory remedy which was intended to be exclusive and preempts the right to bring an action under Section 1983.

———o———

ARGUMENT

POINT ONE

ALLOWING A SUIT FOR DAMAGES BY MILITARY PERSONNEL AGAINST A SUPERIOR OFFICER UNDER 42 U.S.C. § 1983 WOULD DAMAGE THE NECESSARY UNIQUE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND THEIR OFFICERS AND SO SUCH CLAIMS MUST BE BARRED.

This Court has long recognized that there are special relationships between military personnel and their superior officers that should not be tested in the courts. To be consistent with past opinions upholding that rationale, the cause of action asserted here for damages under 42 *U.S.C.* § 1983 must, as a matter of public policy, be prohibited.

The case whose extension to the facts here must govern is *Chappell v. Wallace, supra.* In that case enlisted men aboard a Navy vessel brought an action seeking damages against their commanding officer, four lieutenants and some noncommissioned officers. The claim raised was that these enlisted men received unequal treatment on account of their race. Causes of action were asserted under 42 *U.S.C.* § 1985, and also under the precedent of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 *U.S.* 388, 91 *S. Ct.* 99, 29 *L.Ed.*2d 619 (1971).

This Court referred to the fact that in the *Bivens* decision, recognition of a cause of action against federal officials who may have violated an individual's constitutional rights was subject to special factors which might make the remedy inappropriate. In the military context, the special factors present were those discussed by this Court in *Feres v. United States, supra.* In *Feres* it was held that the Federal Tort Claims Act did not provide a remedy to military personnel for injuries suffered in service which might otherwise be actionable if civilian in nature. The basis for that decision was the special relationship between soldiers and their superior officers, and the improper effect on the maintenance of discipline that such suit would cause if allowed to proceed. *Chappell,* 462 *U.S.* at 298-299, 103 *S. Ct.* at 2365 citing to *United States v. Muniz,* 374 *U.S.* 150, 162, 83 *S. Ct.* 1850, 1858, 10 *L.Ed.*2d 805 (1963) and *United States v. Brown,* 348 *U.S.* 110, 112, 75 *S. Ct.* 141, 143, 99 *L.Ed.* 139 (1954).

As stated in *Chappell:*

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors,"

> and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . ." This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment. 462 *U.S.* at 300, 103 *S. Ct.* at 2365-66 (citations omitted).

The Court also noted that its view of the proper relationship between the courts and the military extended to the National Guard. In *Gilligan v. Morgan,* 413 *U.S.* 1, 93 *S. Ct.* 2440, 37 *L.Ed.*2d 407 (1973) suit was brought asking for review of the pattern of training, weaponry and orders of a state National Guard. Therein it was stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equiping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Gilligan, 413 *U.S.* at 10, 93 *S. Ct.* at 2446 (emphasis in original), as quoted in *Chappell*, 462 *U.S.* at 302, 103 *S. Ct.* at 2366-67.

Based on the special status of the military and the fact that congress had otherwise provided a specific means for military personnel to have grievances reviewed, this Court concluded that a suit to recover damages for alleged constitutional violations by a superior officer could not be maintained. 462 *U.S.* at 304, 103 *S. Ct.* at 2368.

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.
>
> 462 *U.S.* at 304, 103 *S. Ct.* at 2367.

The decision in *Chappell* was limited to the cause of action under *Bivens*. The issues raised by the claim under 42 *U.S.C.* § 1985 were not reached because not addressed by the Court of Appeals nor adequately argued before this Court. 462 *U.S.* at 305, n.3, 103 *S. Ct.* at 2368.

In *Bivens*, it was acknowledged that the cause of action created was the equivalent of the right to sue an individual acting under color of state law pursuant to 42 *U.S.C.* § 1983. 403 *U.S.* at 391, n.4, 91 *S. Ct.* at 2002. It would therefore follow that for the same reasons expressed in *Chappell*, an action under 42 *U.S.C.* § 1983 by military personnel against superior officers should be barred. That is exactly the result reached in *Martelon v. Temple*, 747 *F.*2d 1348 (10th Cir. 1984), cert. den.—*U.S.*—, 105 *S. Ct.* 2675 (1985). The plaintiff in *Martelon* was a member of the Colorado National Guard who was also employed as a

civilian administrative supply technician. After a military transfer, there was no comparable civilian activity available in his new unit and his civilian job was terminated because the new military assignment was incompatible with continued technician employment. 747 *F.*2d at 1349. The action brought sought relief from termination as a Guard Technician. The relevant cause of action asserted was for failure to provide a hearing before terminating technician employment which was brought pursuant to 42 *U.S.C.* § 1983.

Citing to *Chappell* and *Gilligan,* the Tenth Circuit found that there could be no liability under Section 1983 for alleged transgressions by superior officers against military personnel. Id. at 1351.

In other cases brought by military personnel against superior officers under various provisions of the Civil Rights Acts, the courts have had little difficulty in holding that dismissal was the required result. *Brown v. United States,* 739 *F.*2d 362 (8th Cir. 1984), cert. den.—*U.S.*—, 105 *S. Ct.* 3524 (1985), concerned an incident in which a black National Guardsman was subject to a racially motivated mock lynching. An action was brought against the participants in the lynching incident as well as against the United States and superior officers for failing to prevent it and failing to adequately investigate after the fact. While the Eighth Circuit concluded that the action against the participants, who were not superior officers, could go forward, summary judgment was ordered as to the United States and all other defendants. Relying on *Feres* and *Chappell,* the Eighth Circuit found that the *Feres* doctrine can be a bar to a Section 1983 suit where it is determined

that circumstances so warrant. The key factor taken into account by the court in *Brown* was, again relying on *Feres*, the effect on military discipline.

While prosecution of a cause of action against those who participated in the hanging incident was found not to damage military discipline, that was not so for failure to prevent the hanging incident and failure to perform a proper investigation. The claim that there was negligence in failing to prevent the incident was found to directly call into question disciplinary decisions by superior officers. 739 *F.*2d at 369. The same held true of the alleged failure to perform a proper investigation. *Ibid.*

Yet another court applied *Chappell* in a civil rights context to bar a cause of action in *Mollnow v. Carlton*, 716 *F.*2d 627 (9th Cir. 1983), cert. den. 465 *U.S.* 1100, 104 *S. Ct.* 1595, reh. den. 466 *U.S.* 954, 104 *S. Ct.* 2162. Mollnow alleged that a conspiracy existed to remove him from the Air Force Reserve because of his superior officers' embarrassment over their having ignored his warnings about certain unsafe conditions. Along with a *Bivens* claim, he asserted causes of action under 42 *U.S.C.* §§ 1985 and 1986.

Recognizing that *Chappell* directly barred the *Bivens* claim, the court turned to what had not been reached in *Chappell*, a claim under Section 1985. Because the claim arose under Section 1985(a), a statute granting a remedy for injured federal officers, the general limitations expressed in *Bivens* for allowing a claim regarding violation of constitutional rights were held inapplicable. 716 *F.*2d at 631. Nevertheless the rationale of *Chappell* and *Feres* was still utilized.

After noting that *Feres* relies primarily on the maintenance of military discipline, the court in *Mollnow* stated:

> A § 1985(1) action would strike directly at that special military relationship, perhaps even more so than an action for negligence. In a negligence action, a spontaneous event has occurred; someone has suffered an accident and another is at fault. Under § 1985(1), however, an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer, so long as the subordinate alleged the superior had interfered with his military "duties." Then a *civil* jury would be empanelled to inquiry into the nature of this uniquely military matter, and damages could be assessed against his superiors for the exercise of their judgment and discretion. Such a result would offend the principles announced in *Chappell*, . . .
>
> 716 *F.*2d at 631 (emphasis in original)

Any challenge to military orders was found best left to the internal system of military justice. If challenges to orders were allowed to be brought in the civil courts, "[T]he military could not function under those conditions." 716 *F.*2d at 632.[2]

The same result was reached as to a claim under Section 1985(3) in *Alvarez v. Wilson*, 600 *F. Supp.* 706 (N.D. Ill. 1985). See also *Gaspard v. United States*, 713 *F.*2d 1097 (5th Cir. 1983), cert. den.—*U.S.*—, 104 *S. Ct.* 2354, 80 *L.Ed.*2d 826 (1984) and *Jaffee v. United States*, 663 *F.*2d 1226 (3d Cir. 1981) (en banc), cert. den. 456 *U.S.* 972, 102 *S. Ct.* 2234, 72 *L.Ed.*2d 845 (1982).

The above line of cases leaves no room for any conclusion other than that the cause of action asserted here

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[2]The Section 1985 claim, having been dismissed, and because relief under Section 1986 depends on a claim under Section 1985, the Section 1986 cause of action was also dismissed. 716 *F.*2d at 632.

under Section 1983 may not be asserted absent a showing that the particular decision attacked would not have an effect on necessary military discipline. In rejecting this argument, the District Court did not go beyond the fact that the termination of employment challenged related to the plaintiffs' status as civilian technicians. However, this logic was overly simplistic and ignored the realities of the relationship of the work done by technicians to the military mission of the National Guard. The decision to terminate the employment of these plaintiffs was due to the threat their actions posed to completing the military mission of the Guard and so fits precisely into the *Feres-Chappell* line of cases.

The overall mission of the National Guard is stated in 32 *U.S.C.* § 102:

> In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defense of the United States be maintained and assured at all times . . .

When the National Guard Technician Act of 1968 was passed, 32 *U.S.C.* § 709, it created a dual status for those employed. While on the one hand they are employees of the United States Army and the United States Air Force performing technician functions, at the same time in order to be eligible to be a technician, it is necessary that one be a member of the National Guard and hold the appropriate military grade specified. 32 *U.S.C.* § 709(b). The entire legislative history of this statute makes it evident that technicians are not regular civilian employees, but are instead military men whose conduct must be judged according to military rather than civilian standards.

As noted in *American Federation of Government Employees v. Federal Labor Relations Authority*, 730 *F.*2d 1534 (D.C. Cir. 1984) while on its face the Technician Act may have appeared to deal only with retirement benefits, in fact:

> enactment of the Technician Act was essential to assure that the *military* mission of the Guard would be carried out effectively and efficiently. This intent is evident in the provisions which provide for the continuance of the authority of the state adjutants general to exercise command authority over technicians—*as they do over other guardsmen.*
>
> 730 *F.*2d at 1544 (emphasis in original)

The Third Circuit has also seen fit to emphasize the military nature of the Guard in the context of employment of technicians under this statute. Rejecting a claim by the labor union in that case, the same one which represents the plaintiffs here, the Third Circuit held that the general bargaining provisions of the Federal Labor Relations Act did not displace Section 709(e) of the Technician Act. In doing so the court held:

> Congress deemed § 709(e) to be of considerable importance to the proper functioning of the National Guard as a military unit . . .
>
> *New Jersey Air National Guard v. FLRA*, 677 *F.*2d 276, 286 (3d Cir. 1982), cert. den. 459 *U.S.* 988, 103 *S. Ct.* 343, 74 *L.Ed.*2d at 384.

The Third Circuit went on to refer to the "needs of military discipline over Guard Technicians and their dual status as civilian and military personnel . . ." *Ibid.* The Ninth Circuit has approvingly cited to the *New Jersey Air National Guard* case. *Montana Air National Guard v. Federal Labor*

Relations Authority, 730 *F.*2d 577 (9th Cir. 1984) and *California National Guard v. Federal Labor Relations Authority*, 697 *F.*2d 874 (9th Cir. 1983).

The particular subject matter of the *American Federation of Government Employees* case is especially revealing. The union there sought to negotiate a provision requiring that when a reduction in force, authorized by 32 *U.S.C.* § 709(e)(4), takes place, technicians would be ranked only according to a technician appraisal score without regard to military performance. The District of Columbia Circuit rejected the notion that such a proposal was a required subject of negotiations.

In reaching its conclusion, the court thoroughly reviewed the legislative history of the National Guard Technicians Act of 1968. It noted that "it was necessary to carefully craft the legislation so as not to compromise the essential military requirements of state Guard service." 730 *F.*2d at 1543. After quoting the remarks of various senators and congressmen, the court opined that:

> . . . *the purpose of the technicians was to insure that the military mission of the National Guard* would be carried out effectively and efficiently. This "fundamental purpose," as Senator McIntyre put it, renders easy the search for the Act's "mandate." *That mandate is to preserve the Guard's military effectiveness and efficiency,* which is accomplished by the Act insuring the Guard's ability to recruit and maintain technicians qualified for *both* their civilian and military roles and preserving the command authority of the state adjutants general in personnel actions in general and reductions-in-force in particular.
>
> 730 *F.*2d at 1545-1546 (emphasis in original)

Because limiting reduction in force ratings to those on the technician side would damage the military purpose of

the Guard, the court held that the clause the union sought to put in its contract would be "incompatible with sound defense planning of our military preparedness . . ." *Id.* at 1546.

The issue in the *New Jersey Air National Guard* case was whether the Guard must negotiate procedures for dismissal for cause and other matters as to which authority is granted Adjutants General pursuant to 32 *U.S.C.* § 709(e). Were Adjutants General required to submit dismissals and other disciplinary actions to a grievance procedure, the congressional intent of allowing the military command structure to function in such situations as evidenced by Section 709(e) would be damaged, and so the Third Circuit held that the general provisions of the Labor-Managment Relations Chapter of the Civil Service Reform Act of 1978 regarding collective negotiations for federal employees must give way to the specific grant of authority to Adjutants General to dismiss technicians.

That dismissal of a technician even where allegedly based on arbitrary and capricious hostility of superior officers is sufficiently military in nature to be beyond review by civilian courts was expressly stated by the Fifth Circuit in *NeSmith v. Fulton*, 615 *F.*2d 196 (5th Cir. 1980). While finding that on all other relevant grounds, the Fifth Circuit test for whether courts would deal with military issues set forth in *Mindes v. Seaman*, 453 *F.*2d 197 (5th Cir. 1971) had been met, the court in *NeSmith* still found dismissal mandated.

> In contrast, consideration of the extent to which the exercise of military expertise or discretion is involved in the decision to discharge NeSmith from a civilian technician post counsels against according judicial re-

> view of his claim. The same great degree of military discretion is entailed in deciding whether to remove an employee "for cause" as is involved in such matters as "promotions or orders directly related to specific military functions" that *Mindes* expressly found were improper subjects for judicial review.
>
> 615 *F.*2d at 203.

The breadth of the doctrine barring damages against the military is readily apparent from the en banc decision of the Eighth Circuit in *Miller v. United States,* 643 *F.*2d 481 (8th Cir. 1981). The plaintiff in that case was an Army private who on his off-duty time was working in a civilian job for a subcontractor erecting scaffolds on government owned family living quarters. In the course of performing that civilian work, Miller was electrocuted. The District Court dismissed the action on the basis of *Feres* but was reversed by a panel of the Eighth Circuit. On rehearing en banc, the Eighth Circuit reinstated the dismissal.

In concluding that *Feres* applied to bar Miller's action, the court found that the work he performed, although being done for a civilian employer, "was related to the military mission of the base, since it involved construction of residential quarters to be owned by the Government and located on the base." 643 *F.*2d at 494. The key was that Miller was at all times subject to recall for military duty had his superior officer so chosen, and the "immediacy of his peculiar and special relationship to his military superiors had not been severed by any such formality as a furlough, leave, or pass." *Ibid.* Even more telling was the following:

> Finally, if this case were permitted to go to trial, plaintiffs would seek to establish that the United States, presumably acting through the commanding officer of

> the post at which Private Miller was stationed, was negligent in, among other respects, failing to de-energize the electric line with which the scaffolding being erected by Miller came into contact. Thus, the conduct of Miller's military superior would be called in question in the civil courts, a circumstance that might well have the destructive effect on military authority and discipline mentioned by the Supreme Court in *Brown*. In any event, the relationship between the facts of this case and possible impairment of military discipline is at least as great as it was in *Feres* itself. *Ibid.*

If the facts of *Miller* present a threat to military discipline, then surely the facts here present a far greater one. There is no dispute that this case arose out of objections by technicians to a proposed change in their work hours for one particular day. As a result of these objections, a meeting was held at which the subject of compliance with the orders for the new schedule was discussed. While the parties have disputed whether or not the plaintiffs advocated refusing to report or other means of work slowdown, for purposes of deciding the issue before this Court, resolution of that dispute is not necessary. The mere fact that the subject matter involved compliance with orders from superior officers as to performing work should be enough to make it clear that this case falls within the *Feres* and *Chappell* precedent.[3]

That the subject matter of scheduling for technicians at Air Defense facilities is directly related to military preparedness is irrefutably established by the statute. 32 *U.S.C.* § 709(g)(1) provides:

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[3]For discussion of the facts, see the initial Third Circuit opinion in this case, 776 F.2d 75, 77-78 (3d Cir. 1985), at pages 48a-51a of the appendix to the Petition for Certiorari.

> Notwithstanding Sections 5544(a) and 6101(a) of Title 5 or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites—
>
> (A) prescribe the hours of duty;
>
> (B) fix the rate of basic compensation; and
>
> (C) fix the rates of additional compensation;
>
> to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays . . .

This is an unequivocal grant of authority to require that technicians work at times when they would not ordinarily be working when necessary for performance of their functions.

At the time of the relevant events, the work being done by the technicians related to a national security directive mandating that the Tactical Fighter Wing to which these technicians were assigned be combat ready by October 1, 1981. Any disruption of performance of work as a protest against the hours assigned would have placed compliance with that directive in jeopardy. If that does not implicate decisions of superior officers which are part and parcel of the required system of discipline reasonably related to assuring the federal military purpose of the Guard, then it is hard to see what would be. If this Court wishes to maintain the policies underlying *Feres* and *Chappell,* then it is vital that the kind of action for damages at issue here be prohibited.[4]

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[4]The petitioner does make this argument in Point II of the Petition for Certiorari.

POINT TWO

THE STATUTE PROVIDING AUTHORITY FOR THE ACTION TAKEN DOES SO AS A MATTER OF FEDERAL LAW SO THAT THE ADJUTANT GENERAL DID NOT ACT UNDER COLOR OF STATE LAW, AND IN ANY EVENT THE STATUTE PREEMPTS THIS CAUSE OF ACTION.

The termination of the employment of plaintiffs was effectuated pursuant to 32 *U.S.C.* § 709. Thus, the source of authority was federal and not state law. As a result, the defendants did not act under color of state law as required for an action under 42 *U.S.C.* § 1983.

The arguments supporting this position have been ably set out in the petition for certiorari and will not be repeated at length here. AGAUS would simply like to reemphasize that the decisions relied upon by Judge Rosenn in dissent accurately reflect the facts here and are a sounder basis for deciding this question than those relied upon by the majority. In particular, Judge Rosenn correctly narrows his inquiry to the particular action being challenged to see if authority conferred by state law played a role. Aside from the fact that the Adjutant General is appointed at the state level, it is federal law which completely governs these facts. Absent 32 *U.S.C.* § 709 there would be no technicians and there would be no authority on the part of an Adjutant General to dismiss them from employment. Where someone holds state employment, but in a particular situation is acting as an agent of the federal government, it is much more reasonable to find that that person is acting under color of federal law. *Ellis v. Blum,* 643 *F.*2d 68 (2d Cir. 1981); *Askew v. Bloemker,* 548 *F.*2d 673 (7th Cir. 1976).

Furthermore, the plaintiffs here had available and used a remedy of appealing their dismissal by virtue of an action under the Administrative Procedure Act. Claims for back pay have been transferred to the United States Court of Claims. As Judge Rosenn argues, the concerns expressed by this Court in *Bush v. Lucas,* 462 *U.S.* 367, 103 *S. Ct.* 2404, 76 *L.Ed.*2d 648 (1983) are equally applicable here. Just as the civil service remedy there barred a *Bivens* cause of action, so too should the specific remedy granted National Guard Technicians void the statutory equivalent of *Bivens,* an action under 42 *U.S.C.* § 1983.

For these additional reasons, the decision of the Third Circuit is an erroneous one which needs to be rectified by this Court. Accordingly, the claim for damages under 42 *U.S.C.* § 1983 should be dismissed.

———o———

CONCLUSION

For the aforestated reasons, the petition for certiorari should be granted, and the decision of the Third Circuit should be reversed.

Respectfully submitted,

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Dated: July 15, 1986

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY A. JOHNSON and JOHN J. SHELLER,

Plaintiffs,

v.

VERNE ORR, Secretary, Department of the Air Force; FRANCIS GERARD, Major General, The Chief of Staff (Adjutant General) State of New Jersey Department of Defense; WILFRED C. MENARD, JR., Major General; COLONEL JOHN MURPHY, New Jersey Air National Guard; BRIGADIER GENERAL CHARLES YOUNG, Air Commander, New Jersey Air National Guard,

Defendants.

OPINION

(Filed Dec. 22, 1983)

THOMPSON, District Judge

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This case has been brought by Plaintiffs Roy Johnson and John Sheller. Both were civilian federal employees with the New Jersey Air National Guard ["NJANG"]. Plaintiffs were dismissed from their positions as NJANG technicians for conducting a union meeting and advocating a "job action." They have now brought suit against Defendants Orr, Secretary of the U.S. Department of the Air Force, and Gerard, Chief of Staff of the NJANG, in their official capacities. They have also brought suit against Defendants Menard, Chief of Staff of the NJANG when plaintiffs were dismissed, Murphy, plaintiffs' supervisor, and Young, Commander of the NJANG at Mc-

Guire Air Force Base when plaintiffs were dismissed as individuals.

As to Defendants Menard, Murphy and Young ["defendants"], plaintiffs allege that the defendants fired them in retaliation for exercising their First Amendment rights. They charge that the defendants acted in an arbitrary and capricious fashion to deny them of their property in violation of their constitutional rights and without adequate due process. Plaintiffs request damages under 42 U.S.C. § 1983, and directly under the Constitution in a *Bivens* cause of action. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Plaintiffs also asked for review of the NJANG's determinations under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*, and for damages under the Back Pay Act, 5 U.S.C. § 5596.

In its opinion of March 8, 1983, this court recognized plaintiffs' right to proceed in this action except as to monetary claims against the federal government, which were transferred to the Court of Claims. Individual defendants Murphy, Menard and Young now move to dismiss the claims against them in light of two recent Supreme Court cases, *Bush v. Lucas,* 103 S.Ct. 2404, 51 U.S. L.W. 4752 (1983) and *Chappell v. Wallace,* 103 S.Ct. 2362, 51 U.S.L.W. 4733 (1983).

The case of *Chappell v. Wallace* does not preclude a *Bivens* action against defendants in this case. *Chappell* provides that federal courts should not imply a cause of action directly under the constitution when it will interfere with military discipline. The logic of the case is that courts are ill-equipped to weigh the factors that go into

the unique need for discipline between a soldier and his or her superior. The Court explicitly premised its decision on the existence of a "framework of . . . intra-military administrative procedures to which courts should defer," and an "exclusive system of military justice." The court stated:

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

51 U.S.L.W. 4733, 4735 (1983).

I find that these factors unique to the military were not at work in this case. The plaintiffs' cause of action arose specifically as a result of the plaintiffs' civilian employment activities, and not as a result of their militia positions. As technicians, plaintiffs were not covered by the comprehensive system of intramilitary justice referred to in *Chappell.* The technicians did not fall into the narrow category of concerns in the relationship between a soldier and his or her superior to which *Chappell* applies. The application of a *Bivens* remedy to a New Jersey Air National Guard technician in an employment-related claim would not unduly impair the operation of the military. In *Chappell,* plaintiffs had requested damages for discriminatory military assignments. The assignments were "incident to military service." Here, Johnson and Sheller claim their firings and denial of due process were as a result of their union activities. Their claims are incident to their civilian employment, not their militia activities.

This is a distinction the Third Circuit appeared to make in *Chaudoin v. Atkinson,* 494 F.2d 1323 (3d Cir.

1974), when the court held that the refusal of a New Jersey Air National Guard technician to participate in a military duty, funeral firing squad detail, did not justify dismissal of the technician from his civilian employment duties. The court held that in the decision whether to fire Chaudoin, the Adjutant General must judge him "as a technician and not as a member of the National Guard." *Id.*, at 1331. Here, I find that the court must judge this situation as one of employer-employee relations, not as one of soldier-military commander relations.

I do not lightly dispose of the defendants' concern that it is difficult to separate plaintiffs' employment and military functions since the commanders serve as both military and non-military superiors to the plaintiffs, and since plaintiffs' civilian job is ultimately related to the National Guard's military function. The *Chappell* exception to *Bivens* is carefully framed in narrow terms, however. Unless the exception should swallow the rule, I find the plaintiffs' civilian employment related claim should not be governed by the *Chappell* exception.

Defendants also urge that the recent Supreme Court case of *Bush v. Lucas, supra,* compels that the Court reverse its opinion that a *Bivens* remedy would apply to this case. In *Bush v. Lucas,* an aerospace engineer was demoted in his federal job for certain statements he made to the press. He attempted to sue his employers directly under the Constiution for damages for the violation of his First Amendment rights.

For the purposes of deciding whether a *Bivens* remedy ought to apply, the Supreme Court assumed that (1) Bush's First Amendment rights were violated by the ad-

verse personnel action; (2) administrative remedies were not as effective as individual remedies and did not fully compensate Bush for the Constitutional harm (*e.g.*, did not award punitive damages or attorneys' fees); and (3) Congress had not provided an alternative statutory remedy that was to be the *exclusive* remedy for the harm alleged.

The Court held that even though the statutory remedy did not provide a complete remedy for the constitutional wrong, courts should not imply a *Bivens* remedy. Federal personnel policy is an area more appropriately left for Congressional action, and therefore constitutes a "special factor counselling hesitation," which would prohibit the courts from creating a new remedy. The "conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal workforce" is an area over which Congress and not the courts should have control. *Bush* at 4757.

The court stated that:

> The question is not what remedy the courts should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addi-

> tion of another remedy for violations of employees' First Amendment rights . . . . In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service . . . . Thus we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights . . . because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

51 U.S.L.W. 4758-59.

The fact of a comprehensive statutory system of remedies is not determinative of whether a court should imply a *Bivens* cause of action. Rather, the system was treated by the Supreme Court in *Bush* as an example of how difficult questions of federal personnel policy are, and how a court's interference in these balances would undermine those choices made by Congress.[1] Therefore, in light of the inherent and demonstrated interest of Congress in establishing federal personnel policy, the Court should hesitate to imply a remedy unless the area of personnel policy is one where Congress has abrogated its interest and judicial establishment of a remedy would not interfere in any balancing of rights Congress has undertaken.

In the present case, I find *Bush* does apply. The court does not dispute that the remedy available to plain-

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[1] The comprehensiveness of the remedy provided by Congress is also significant in determining whether the remedy is so constitutionally inadequate that the court might be obliged to imply a remedy for the vindication of constitutional rights. 51 U.S.L.W. 4756, n. 14. This point is not at issue here.

tiffs might be less effective or complete than a cause of action directly under the Constitution. I find, however, that Congress is more competent to assess issues of personnel policy for the federal employees of the National Guard, as described by the theory of *Bush*. Congress specifically undertook to bring technicians under federal control in the 1968 National Guard Technician's Act, 32 U.S.D. § 709. With that Act, Congress decided the remedy available to technicians for employment actions, including that a technician cannot be fired from civilian employment without cause, § 709(e)(3), or unless first separated from requisite National Guard membership, § 709(e)(1) and (2). The legislative history of the Act makes clear that Congress balanced issues of federal personnel specific to National Guard technicians, including the need for state controls which would not apply to other civil service employees. *House Report No. 1823,* reprinted in 1968 U.S. Code Cong. and Admin. News 3324. *See also New Jersey Air National Guard v. F.L.R.A.,* 677 F.2d 276 (3d Cir. 1979). I therefore find that as in the *Bush* situation, Congress is the appropriate body to have weighed the intricacies of the dual status of these federal employees and to make policy decisions regarding technicians' remedies for adverse employment actions. In the absence of a Congressional remedy, the court shall not imply one.

I note that this is not a case where Congress has denied all remedies. Plaintiffs had an administrative hearing which was reviewed by the Adjutant General. The plaintiffs claim that these procedures were rendered ineffective by the defendants' actions. This court has already held that our own review of the administrative de-

liberations can remedy this deficiency, and that the court can award reinstatement and injunctive relief. The Court of Claims may award back pay and attorneys' fees.

While the scheme of employee rights available to the plaintiffs may not be as comprehensive as the civil service scheme described in *Bush,* I find that it does evidence a Congressional weighing of a variety of factors in an area of specific Congressional concern, federal personnel policy. I believe that in light of the Supreme Court's recent analysis in *Bush,* it would be imprudent for the court to interfere with these balances by allowing a *Bivens* remedy. *See also Hansen v. U.S. Dept. of the Air Force,* Civil No. 80-685 (September 14, 1983, D.N.J.), in which Judge Gerry dismissed the *Bivens* claim of a New Jersey Air National Guard technician in light of *Bush v. Lucas.*

Defendants apparently also argue that if the *Bivens* claims against them are dismissed in light of *Bush,* then the 42 U.S.C.A. § 1983 claims must also be dismissed under the same analysis. I find that the logic in *Bush* is not equally applicable to the § 1983 claims, and that defendants' motion as to this point will be denied.

The *Bush* case specifically addresses when courts should imply a remedy in an area of distinct Congressional concern where Congress has not authorized a remedy. In the § 1983 case, Congress *has* provided a specific remedy. Namely, when a person acts under the color of state law to deprive another person of a constitutional right, § 1983 specifically provides that the injured party does have a private cause of action. Defendants have cited no cases showing that a § 1983 complaint should be dismissed in a case such as this. In fact, in *Chappell,*

supra, a case similar to *Bush* in that the Supreme Court refused to allow a *Bivens* claim due to special factors counseling hesitation, the Court declined to decide whether or not an action under 42 U.S.C.A. § 1985 could be maintained. 51 U.S.L.W. at 4736, note 3.

Although the court will follow *Bush v. Lucas* and refrain from implying a cause of action directly under the constitution in this case, where such a cause of action has already been provided by Congress, premised on the condition that defendants' actions were under the color of state law, the court will not dismiss the count.

Finally, General Menard argues that the complaint should be dismissed against him under a theory of judicial immunity. General Menard is the Adjutant General and Chief of Staff of the New Jersey Department of Defense. Menard was responsible for determining whether or not to accept the hearing examiner's recommendations to dismiss the plaintiffs. He claims that in doing so, he acted in a judicial capacity and therefore is immune from an action for damages. In the alternative, Menard argues that he is a state officer entitled to qualified or "good faith" immunity for acts performed in the course of his official responsibilities.

The court is not convinced that the Adjutant General should be entitled to judicial immunity. Although his duty in this case involved reviewing a record and rendering a decision, this alone should not qualify him for the kind of immunity accorded to members of the judiciary and court system. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978). Rather, the judgment made by Menard was clearly in the realm of an employment de-

cision. To afford these kinds of employment decisions, judicial immunity, even when based on a formal hearing, would be an extension of the doctrine of judicial immunity.

Rather, *Scheuer v. Rhodes,* 416 U.S. 232 (1974) has established that an Adjutant General's decisions are entitled to a qualified good faith immunity. If Menard's actions violated plaintiffs' constitutional rights, and were outside the scope of his office, arbitrary, malicious or an abuse of power, he will be held accountable. *Scheuer,* and *Procunier v. Navarette,* 434 U.S. 555 (1978). A finding of immunity depends on all of the circumstances that are revealed by the evidence and as they reasonably appeared at the time of Menard's actions. *Scheuer.* At this time, the court will not conclude that Menard is immune from suit. The circumstances as to Menard's intent in light of plaintiffs' allegations of retaliation, malice and bad faith are not developed sufficiently for the court to make a judgment as to the extent of any immunity it might grant to defendants. The court is aware of the policy considerations discussed in *Sheuer* relating to the necessary discretion allowed to state officials in the exercise of their official duties. At this time, however, a judgment as to immunity would be premature.

In conclusion, the court will dismiss plaintiffs' cause of action directly under the constitution in light of the Supreme Court's recent holding in *Bush v. Lucas, supra.* The remainder of defendants' motion will be denied.

December 21, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-2578

ROY A. JOHNSON and JOHN J. SHELLER,
Plaintiffs,

v.

VERNE ORR, Secretary, Department of the Air Force; FRANCIS GERARD, Major General, The Chief of Staff (Adjutant General) State of New Jersey Department of Defense; WILFRED C. MENARD, JR., Major General; COLONEL JOHN MURPHY, New Jersey Air National Guard; BRIGADIER GENERAL CHARLES YOUNG, Air Commander, New Jersey Air National Guard,
Defendants.

ORDER

(Dec. 22, 1983)

This matter having come before the court on defendant Menard, Murphy, and Young's motion to dismiss and the court having considered this motion and opposition and the oral argument, briefs and supporting papers submitted by the parties and for the reasons stated in the court's opinion filed even date herewith; it is on this 21st day of December 1983,

ORDERED that defendants' motion to dismiss counts brought directly under the constitution is granted; and it is further

ORDERED that defendants' motion to dismiss counts brought under 42 U.S.C.A. is denied; and it is further

ORDERED that defendant Menard's motion to dismiss the complaint for reasons of immunity is denied.

/s/ Anne E. Thompson, U.S.D.J.